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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

BETTYE HEERDINK,
Petitioner

versus

AMOCO OIL COMPANY

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Seventh Circuit err in exceeding its proper scope of review under Rule 52(a), Fed.R.Civ.P., Anderson v. City of Bessemer, 470 U.S. 564 (1985), and other standards of appellate review by substituting its own opinion for that of the district court: by finding facts on appeal, weighing facts, making inferences from facts, and failing to acknowledge the support in the record for the district court's credibility determinations?

2. Did the Seventh Circuit err in reversing the district court's judgment by failing to acknowledge Petitioner's sweeping pretext evidence as provided for under Patterson v. McLean Credit Union, 491 U.S. 164 (1989)?

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

BETTYE HEERDINK,

Petitioner,

v

AMOCO OIL COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Bettye Heerdink, Petitioner, respectfully prays the Supreme Court to grant a Writ of Certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on December 10, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 919 F.2d 1256 (7th Cir. 1990) and is reproduced in the Appendix (A-37). The Order of the Court of Appeals

denying Petitioner's petition for rehearing with suggestion for rehearing en banc was not published and is reproduced in the Appendix (A-47). The Judgment and Entry of the district court were not published and are reproduced in pertinent part in the Appendix (A-3 and A-5).

JURISDICTION

The opinion of the Court of Appeals was entered on December 10, 1990. The Court of Appeals Order denying Petitioner's petition for rehearing with suggestion for rehearing en banc was entered on January 8, 1991. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULE INVOLVED

The pertinent parts of Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e 2(a), of

Rule 52(a) Fed.R.Civ.P., and of 28 U.S.C. § 2111 are reprinted in the Appendix at pages A-1 and A-2.[1]

STATEMENT OF THE CASE

On July 23, 1979 an over-the-road truck driver named Bettye Heerdink applied for a truck driving job with Amoco Oil Company at its Evansville, Indiana terminal. As of that day Amoco had never recruited and hired a qualified woman driver for permanent employment in its Great Lakes Marketing Region. Amoco's

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[1]Abbreviations used in this Petition are as follows:

App	Appendix cited to as App A-_
FF	Findings of Fact from District Court's Entry of June 30, 1989 (citation would be App A-_ FF_)
CL	Conclusions of Law from District Court's Entry of June 30, 1989 (citation would be App A-_ CL_)
Tr V.	Trial Transcript, Volume
Jt Ex	Joint Trial Exhibit
P Ex	Petitioner/Plaintiff's Trial Exhibit
RA	Request for Admission
Interrog	Interrogatory

Evansville drivers hauled petroleum into and out of their terminal, as did the company drivers throughout the United States.

Bettye Heerdink submitted her application in person to Amoco Oil Company's terminal manager, Gene Stoltz. Bettye Heerdink had over three years' over-the-road driving experience, and she had hauled heavy, complex and dangerous loads; she had an unblemished safety record. Amoco asserted at trial that there were two basic requirements for its driving jobs: a minimum of 3,000 hours' driving experience and passing the Department of Transportation physical examination. Bettye Heerdink met both of these criteria.

One driving job was open on the day she applied, and one job was coming open because a new rig had been purchased to

increase business at the Evansville terminal.

The first job was filled by William Hall. He was terminated in September, 1979 at which time two jobs were open: the one vacated by Hall and the job driving the new truck. These two jobs were not filled until December when Amoco hired Larry Happe and George Rupp. Heerdink was not considered for any of the three jobs.

On June 26, 1981 Bettye Heerdink filed a judicial complaint of sex discrimination under 42 U.S.C. § 2000e et seq., Title VII of the Civil Rights Act of 1964, as amended, and 28 U.S.C. § 1331 and §1343.

A trial of Heerdink's cause began on June 6, 1988 and concluded on June 8, 1988. On July 20, 1989 the district court found that Amoco intentionally

discriminated against Bettye Heerdink, rejecting her without considering her.

The district court made a principal finding that the preference for hiring applicants with petroleum hauling experience, which Gene Stoltz claimed he had, was pretextual, finding that Stoltz's testimony was not credible. The district court concluded that Bettye Heerdink was not considered on account of her sex and that she would have been hired if she had been considered.

Amoco took appeal and the court of appeals on December 10, 1990 reversed the lower court's judgment. It found as a matter of law that the district court had incorrectly applied a shifting burden of proof rather than production to Amoco's rebuttal burden and decided that the district court's finding of pretext was clearly erroneous in that it was

unsupported by the evidence. On January 8, 1991 the court of appeals denied Heerdink's petition for rehearing and suggestion for rehearing en banc.

REASONS FOR GRANTING THE WRIT

I. Reasons for granting certiorari.

The Supreme Court in Anderson v. City of Bessemer, 470 U.S. 564 (1985), recognized that plaintiffs in Title VII cases must concentrate their energies and resources on persuading the trial judge that the preponderance of material facts proves their case. This Heerdink did. But the appellate court, without supporting citation to the record, adopted Amoco's version of the "facts" including some "facts" that appear nowhere in the record and added "facts" not even argued by Amoco. The appellate court replaced the district court's inferences with its own,

reweighed facts weighed differently by the district court and failed to credit and defer to the district court's credibility findings, all in violation of the constraints of Rule 52 as set out in this court's opinion in Anderson v. City of Bessemer, 470 U.S. 564 (1985) and Amadeo v. Zant, 486 U.S. 214 (1988).

If left standing, the Heerdink opinion will represent an open invitation to all the circuit courts of appeal to ignore Anderson and re-try district court cases. Heerdink seeks a writ of certiorari to prevent chaos in the administration of justice at the appellate level.

The principle of judicial economy set out in Anderson militates in favor of granting certiorari to prevent appellate courts from usurping the role of the district courts.

Patterson v. McLean Credit Union, 491 U.S. 164 (1989), plainly teaches that a plaintiff may prevail with varieties of pretext evidence other than a showing of better qualifications. The appellate court's refusal to honor the Patterson rule places it in direct conflict with Patterson and invites inconsistency and injustice in the adjudication of Title VII cases.

II. The District Court's findings of pretext are fully supported by the record and cannot be overturned under Rule 52(a).

A. The record fully supports the district court's finding of pretext.

(1) The district court's pretextuality findings on prior petroleum hauling experience preference are fully

supported by the record.

The district court found the petroleum hauling experience defense pretextual, based on its finding that Stoltz's testimony was not credible. The district court found that Gene Stoltz did not in fact have any preference for prior petroleum hauling experience, that he did not consider Heerdink, and that if he had considered Heerdink, she would have been hired.

The core of the district court's findings was that the court did not believe terminal manager Gene Stoltz's testimony that he had a petroleum hauling preference which he applied to candidates without regard to sex. The district court found that Gene Stoltz in fact did not have the preference for petroleum hauling which Amoco claimed he had. (App A-16, 23, 30-32)

The district court observed Stoltz's demeanor at trial and identified Stoltz's alleged preference as "a subterfuge" to reject Heerdink. (App A-16 FF 39) Each time following that finding the district court referred to Stoltz's alleged hiring criterion as a "preference", i.e., it placed the word in quotation marks to specify the criterion was not genuine. (App A-16 FF 39, 23 CL 5, 31, 32)

The district court made three other findings probative of the pretextuality of petroleum hauling as a selection device which support the court's finding of pretext. The district court found that Amoco had done no analysis of the safety records of its hires with petroleum hauling experience compared with the safety records of its hires without this experience. (App A-16-17 FF 40; P Ex 27, Interrog 6) The district court found that

accident reports from the Evansville and Indianapolis terminals showed no correlation between prior petroleum hauling experience and accidents and no correlation between serious chargeable accidents and prior petroleum hauling experience. (App A-17 FF 41; P Ex 61) Finally, the district court found that two Amoco drivers involved in serious chargeable accidents at Indianapolis both had petroleum hauling experience. (App A-17 FF 42; P Ex 61)

(2) The record contains further evidence to support the district court's credibility finding that Gene Stoltz's claimed prior petroleum hauling experience preference was pretextual.

Before trial Stoltz testified that petroleum hauling was his requirement; at trial he testified that it was not a requirement, only his preference, and he

specifically stated it was not a qualification. (Tr V. II p. 172 line 13-p. 175 line 3; p. 181 lines 7-10)

George Preston, an Amoco staff employee relations representative, contradicted himself on the stand as to whether he and Stoltz discussed any petroleum hauling preference. (Tr V. II p. 140 line 6-p. 146 line 16, p. 158 lines 8-12, p. 163 line 3-p. 164 line 9)

Stoltz listed the driver openings and requirements with the Indiana Employment Security Division, the State employment service, but he listed no petroleum hauling experience preference. (P Ex 28, RA 23; P Ex 27, Interrog 30, 33; Tr V. II p. 140 line 10-p. 141 line 1, p. 142 line 22-p. 143 line 12, p. 148 line 3-p. 149 line 2; see also Tr V. II p. 78 line 19-p. 79 line 1)

Stoltz was questioned at trial about what skills he believed were involved in driving Amoco's petroleum transport trucks. Mentioning no skill geared to petroleum hauling, Stoltz answered:

> . . . alertness, certainly experience I believe is a skill the ability to read and write, or at least read, being aware of laws, being safety minded, as far as not being a hazardous operator on the road. . . .

(Tr V. III p. 59 line 21-p. 60 line 5) Stoltz then testified he believed that Bettye Heerdink in 1979 would have been a good driver for Amoco. (Tr V. III p. 60 lines 6-13)

The evidence showed that Amoco hired applicants without petroleum hauling experience over applicants with such experience. (P Exs 37, 38, 40; Tr V. II p. 92 lines 4-19; P Ex 27, Interrog 16, 28; P Ex 28, RA 2) Amoco admitted to the Office of Federal Contract Compliance

Programs (OFCCP) in its affirmative action plans that it underutilized women in its driving workforce. In listing recruitment pools from which it could expect to find women with the skills to drive Amoco's petroleum trucks, it used census data from the operative workforce, truck driver workforce and heavy truck driver workforce. It did not use a petroleum hauling workforce pool. Bettye Heerdink was a member of all three groups from which Amoco had promised OFCCP it would hire women. (P Exs 9-17)

Amoco stated that there was no discrepancy between its assertion to the City of Evansville Human Relations Commission that Stoltz had a preference for liquid transport experience and his assertion that the men hired were better qualified by having petroleum hauling backgrounds. (P Ex 27, Interrog 27; P Ex

28 RA 31, 32; P Ex 18) Heerdink had hauled liquid concrete and hot asphalt. (Tr V. I p. 27 line 17-p. 28 line 23; App A-8 FF 12; Tr V. I p. 86 lines 11-14) Had Stoltz actually had any such prior liquid experience preference, Heerdink had it.

(3) The district court made other findings probative of pretext.

Respecting the district court's finding that Gene Stoltz did not consider Heerdink, the court contrasted treatment Stoltz accorded male hire Hall--whom he had considered--with his treatment of Heerdink, whom he did not consider. The district court found Stoltz checked Hall's references without investigating Heerdink's background; Stoltz offered Hall a job without requiring him to drive, but did not allow Heerdink an opportunity to show she could drive; Stoltz asserted that Heerdink would have

needed extensive training while he gave Hall more than two weeks' training; and he offered Hall, but not Heerdink, a job instead of Allen Dike, whom he contended was more qualified than Hall. (App A-12-13 FF 26; see also Tr V. II p. 183 lines 8-11, p. 72 line 17-p. 73 line 3, p. 192 lines 11-13, p. 185 line 13-p. 189 line 7, p. 183 lines 5-7; Tr V. III p. 62, lines 2-6, p. 64 line 9-p. 65 line 4, p. 48 line 21-p. 49 line 3, p. 50 lines 13-15; P Ex 62)

The district court found that when Heerdink applied in July, 1979 Stoltz told her she met Amoco's requirements for transport truck drivers, and he told her she could check back to see if there were openings. (App A-10 FF 17; Tr V. I, p. 40 line 3-p. 42 line 2) However, he knew that there already was one opening at that time and that a new driving job was

opening up with the purchase of a new rig. (App A-15 FF 35; Tr V. III p. 50 line 20-p. 51 line 9, p. 73 line 11-p. 74 line 22; Tr V. II p. 73 lines 17-23)

The district court found that Heerdink was not considered by Stoltz for either of the two jobs available in September. (App A-15 FF 35 see also App A-15 FF 34, A-14 FF 29, A-7 FF 7 and A 10-11 FF 19) Stoltz contradicted himself at trial on this: he claimed he had in fact considered Heerdink for a job, but he just had not known what the word "consider" meant the two times he had previously stated in sworn testimony that he had not considered her. (Tr V. II p. 176 line 18-p. 179 line 15; Tr V. III p. 58 line 9-p. 59 line 14)

The district court found that Heerdink was well qualified to hold a driving job with Amoco. (App A-28) The

district court found she had an unblemished safety record. (App A-18 FF 43; Tr V. I p. 32 lines 16-19) It found that she had met Amoco's stated qualifications of 3,000 hours' transport truck experience and had passed the federally prescribed physical examination twice. (App A-9-10 FF 14, 15; Stipulation Tr V. I p. 7 line 23-p. 8 line 10; P Ex 2; Tr V. I p. 33 lines 16-23, p. 23 lines 5-10, p. 54 line 22-p. 55 line 4) The court found that Heerdink had substantial over-the-road, heavy truck driving experience, varied experience that included hauling oversized loads and experience with cargos that presented complex, difficult and/or dangerous jobs. (App A-8-9,10 FF 12, 13, 16; see also Tr V. I p. 23 line 5-p. 32 line 15, p. 34 line 20-p. 35 line 5, p. 50 line 1-p. 53 line 1, p. 64 lines 10-16, p. 86 line 11-

p. 87 line 2, p. 88 line 1-p. 89 line 14) Finally, the district court found that Heerdink's qualifications had not been challenged by Stoltz. (App A-14 FF 29)

The district court found that Hall (black) and Heerdink (female) were both members of protected groups unrepresented at Amoco's Evansville terminal. (App A-14 FF 31, 32) The district court also found that Amoco's affirmative action plan failed to penetrate the Evansville terminal respecting Heerdink's candidacy. (App A-19 FF 50; see also App A-32, A-11 FF 20, A-12 FF 24, A-13 FF 27)

The district court found that Amoco had no practice or procedure to evaluate qualifications of applicants beyond the 3,000 hour, physical examination standards. (App A-14 FF 30; see also App A-12 FF 25)

The district court found that Amoco maintained a male segregated workforce: the entire workforce at the Evansville terminal was male, and Amoco maintained an all male managerial force. (App A-12, 18 FF 25, 45, 46) The district court found that Amoco ". . . made no contact with women or black groups as part of a recruiting effort for the open positions, but used a 'word of mouth' device among the all-male work force and other drivers who frequented the terminal." (App A-19 FF 49)

The district court found that Stoltz solicited applications from the men he hired in December. (App A-15 FF 36, A-31) This method has a predictable effect of perpetuating the unbalanced, all male workforce.

The district court found that "Region Manager Stultz delegated equal

employment opportunity to terminal managers, but the Evansville terminal manager [Stoltz] was unaware of the affirmative action plan and did not know who has such responsibility at the Evansville terminal." (App A-18-19 FF 47; see also Tr V. II p. 61 lines 8-16; Tr V. III p. 65 line 11-p. 66 line 1) The district court found that ". . . the terminal manager felt he had done his part [with regard to equal employment opportunity] and after the Hall debacle, he abandoned any attempt to carry out the recommended hiring practices." (App A-24; Tr V. III p. 67 line 19-p. 68 line 14) The court further found that "[n]o central corporate authority was watching the store." (App A-19 FF 48; see also FF 49 and 50)

(4) The record contains further evidence to support the district

court's findings.

Although Stoltz testified he decided not to fill until December, 1979 either of the two jobs open in September, he did not revoke in September, October and November of 1979 the request for applicants Amoco had filed with the Indiana Employment Security Division, indicating the positions in fact remained open. (Tr V. III p. 68 line 15-p. 69 line 14)

Title VII took effect in July, 1965, but in July, 1979 when Heerdink applied for a truck driving job, Amoco employed not one permanent female driver in Indiana or the Great Lakes Region. (P Ex 23, 24, 33-C; App A-12 FF 25) Amoco produced no statistical rebuttal.

The trial record showed that, in addition to hiring for its Indiana terminals, Amoco had no fewer than 108

truck driving job opportunities nationwide from March, 1978 through March, 1980, but hired only two women. (P Exs. 33-C, 9-17)

In 1984, five years after Heerdink's rejection, Amoco's petroleum hauling workforce in the Great Lakes Region numbered 72, all male. (P Ex 25, Interrog 10; see also A-12 FF 25)

Amoco was obligated under an affirmative action contract with the OFCCP to end male segregation. (P Ex 9-17) Amoco placed six women into truck driving positions in Indianapolis, most of whom transferred from non-driving jobs at another Amoco facility. Only one remained on the Amoco truck driving payroll more than a few weeks or months. (P Ex 23, 43) Amoco put in no evidence to explain this pattern of short-term employment for female drivers.

Amoco represented to the OFCCP that there had been no female applicants at Evansville in 1979, and it represented that all female applicants at Indianapolis were hired. In fact, Bettye Heerdink had applied in Evansville in 1979 and had filed a charge of sex discrimination in 1980, and Amoco admitted in discovery that at least three women who applied in Indianapolis were not hired. (P Ex 10 pp. 142, 244, 245; P Ex. 23; Jt Ex 7)

Amoco claimed that it had studied the impact of its practices, but said it never attempted to validate its selection procedures. (P Ex 9, p. 116; P Ex 16, Interrog 10, 6; see also A-16 FF 40) Amoco told the local administrative agency that an old applicant, Allen Dike, had been rejected (attempting to show a male as rejected), while Stoltz testified

he offered Dike a job. (P Ex 19; Tr V. III p. 55 lines 5-21) Amoco's attorney said at trial that Heerdink was a credible witness. (Tr V. III p. 11 lines 7-8) Gene Stoltz had never driven a truck, and he worked under the supervision of Hugh Stultz who had never driven a truck. (Tr V. II p. 215 lines 1-5, p. 172 lines 9-10, p. 89 line 16-p. 90 line 1) None of the hiring managers under Stultz's supervision hired a woman between 1979 and 1985. (Tr V. II p. 59 lines 2-8; P Ex 33-C, 9-17)

Bettye Heerdink committed no mistake at trial; she laid out pretext evidence rather more comprehensive than has been found in other one-plaintiff cases. As shown above, the district court specifically listed no fewer than 18 facts probative of pretext. The record included no fewer than 17 additional

facts probative of pretext.

B. The appellate court erred under Anderson in overturning the district court's finding of pretext: by failing to defer to the district court's credibility findings supported by the record; by weighing facts; by replacing the district court's inferences; and by finding facts on appeal unsupported by the record.

From the underlying facts the district court properly made a number of inferences; the appellate court from the same facts and others which it found or assumed, improperly substituted different inferences. Anderson v. City of Bessemer, 470 U.S. 564, 574 (1985).

All of the facts supporting the district court's finding of pretext were undisputed[2] except the following facts

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[2]All of the following facts going to the issue of liability found by the district court were not disputed by Amoco: FF 1, 2, 3, 4, 5, 6, 8, 9, 10, 11,

which were in dispute: whether or not Stoltz had a petroleum hauling preference and whether or not he considered Heerdink for hire.[3] The district court resolved these factual disputes in favor of Heerdink on the basis of:

1. a credibility finding against Stoltz with respect to his testimony that he had a petroleum hauling experience preference;

2. a credibility finding against Stoltz with respect to his claim at trial that he had considered Heerdink for hire (see p. 18 above); and

3. a credibility finding against Stoltz with respect to his claimed

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12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29 (1st sentence), 30, 31, 32, 36, 37, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50.

[3]Facts found by the district court and disputed by Amoco: FF 7, 27, 29 (2nd sentence), 33, 34, 35, 39, 51.

reasons for not filling the opening left when Hall was terminated and the opening created by the purchase of a new rig.

The district court ruled that it did not believe any of Stoltz's testimony to the effect that Stoltz had a prior petroleum hauling experience preference:

> The terminal manager's preference for applicants with petroleum hauling experience was a subterfuge to justify his refusal to consider the plaintiff. His real reason for not hiring plaintiff was her sex.

(App A-16 FF 39) The district court observed Stoltz's "variations in demeanor and tone of voice. . ." and made a credibility finding against Stoltz; the appellate court must give special deference to that finding. Anderson, 470 U.S. at 574 and 575.

Stoltz's petroleum preference testimony is internally inconsistent in that he contradicted himself on whether

it was a preference or a requirement and on whether he had considered Heerdink for hire or not. (See above pp. 12-13, 18) The testimony was contradicted by the court's petroleum hauling-and-safety findings and a wealth of other extrinsic evidence most of it objective and unrebutted. (See above Section A)

However, even if Stoltz's story had been facially plausible and internally consistent, the district court must be seen to have made its choice between two plausible views of Stoltz's credibility: to wit, Stoltz in July, August, September and October, 1979 had a genuine petroleum hauling preference or he had no such preference and was offering--after the fact of hiring two hand-picked males--an excuse for his sex bias. The district court's "choice between [the views] cannot be clearly erroneous." Anderson,

470 U.S. at 574, citing to United States v. Yellow Cab Co., 338 U.S. 338 (1949).

The court of appeals failed to discuss this core finding of pretext by the district court and thereby erred in deciding that the district court's findings on discriminatory intent are clearly erroneous. (App A-45) Id.

The district court ruled that Stoltz was not credible, made three findings on petroleum hauling and safety, found that Amoco had no practice by which to evaluate other than basic qualifications and found that Amoco failed to apply its affirmative action plan to Heerdink in Evansville. (See Section A (1) and (3) above) These in themselves are adequate to sustain the district court's judgment. These findings certainly established pretext under Texas Department of Community Affairs v. Burdine, 450 U.S.

248 (1981), and fell under the broad standards for pretext evidence expounded in Patterson v. McLean Credit Union, 491 U.S. 164 (1989).

In determining whether the district court made findings which were clearly erroneous, the reviewing court must consult "the entire evidence". Anderson, 470 U.S. at 573.

The appellate court omitted any reference to Heerdink's having hauled complex and dangerous loads, having an unblemished safety record and having hauled liquids. In fact it erroneously claimed she had never hauled liquids. (App A-39)

Without explanation the court of appeals disregarded Heerdink's extensive pretext evidence and made this astonishing statement: "There is no evidence to support a finding that

Amoco's preference for experienced applicants was a pretext for discrimination." (App A-44)

The appellate court found that "Heerdink testified that Stoltz told her 'he would consider someone with experience before he would consider her.'" (App A-39) Actually Heerdink was not testifying about a broad category of "experience". Her testimony was about Stoltz's alleged petroleum hauling experience preference. "I do recall at our last [meeting in 1980], not the first [meeting in July, 1979], our last talking that he would prefer to hire someone that had petroleum experience" she said. (Tr V. I p. 94 lines 10-16) This was after Stoltz had hired two white males. Heerdink's earlier, less focused testimony was that "he would consider someone with experience before he would

consider me in petroleum." (Tr V. I at p. 44, specifically p. 43 line 17-p. 44 line 12)

On the same point, the panel found that there was some dispute as to whether Stoltz told her about his preference in August or after December. (App A-39 n. 1) The panel believed that "[i]f the comment was made after December it might be more likely that such a comment was pretextual and created to 'explain' the hiring of the two males. . . ." Id. There is no dispute in the record. Heerdink testified unequivocally that Stoltz made the statement the next year, in 1980--and after the white males had already been hired. (Tr V. I at 69-70, 94, 109-110) This testimony is not rebutted.

Stoltz delayed in hiring for the two truck driver jobs from September to December, 1979. Heerdink argued and the

district court found that the delay occurred because Amoco was waiting to recruit male applicants to avoid hiring the qualified female, Heerdink.

Stoltz testified that one job was to drive the new truck which the Evansville terminal was to use to try to increase business; they were:

> . . . going to do the distillate dance . . . going to start moving some product, things were kind of down and [Amoco was] going to get the show on the road, get back to work. I was to receive an additional truck, and hopefully . . . have a couple open positions and hire a couple employees and do some big stuff, as far as delivering petroleum products, increase business."

(Tr V. III p. 51 lines 1-9)

On this point the panel found that "[t]he more reasonable explanation for this delay in hiring (and the one rejected without explanation by the district court) is that the precarious

economic climate affected the timing of Stoltz's hiring decisions." (App A-44) This is a bold declaration that the panel was replacing the district court's factfinding and is in direct conflict with Anderson. Stoltz had actually testified that all he remembered was that he and his boss, Hugh Stultz "didn't elect" to fill the position vacated by Mr. Hall at the time Hall left in September. (Tr V. II p. 204 line 22-p. 205 line 1) He testified that this may have been because the fall was a less busy time each year; "[t]hat normally would have been the time of year where we are less busy versus times when we are busier. . . ." (Tr V. II p. 204 lines 12-14; see generally Tr V. II pp. 203-205)

The district court heard Stoltz's vague recollection on not hiring someone to drive Hall's truck and testimony on

the reason for purchasing the new truck and made a credibility finding against Stoltz, finding that Stoltz:

> . . . left the job open until he found a white male who would make an application. Defendant's explanation of its reason for leaving the job open for ninety (90) days and for its selection of the two (2) white males in December, 1979 is not credible.

(App A-31)

It can be argued the district court could have been more precise in stating that the hiring delays were to give Gene Stoltz and/or Hugh Stultz time to think up the pretext and then to recruit men who had the subterfuge characteristic, petroleum hauling experience. Amadeo v. Zant, 486 U.S. 214, 228 (1988). The district court stated its credibility determination concerning its finding that Stoltz had no petroleum hauling preference. Id. The district court went

on to find further evidence of pretext, and the record beyond that point yields abundant pretext evidence. (See Section A above) There was thus no excuse for the court of appeals to engage in impermissible appellate factfinding. Id.

Furthermore, it is doubtful that the appellate court's allegedly "more reasonable" theory can be classed as a plausible view of the testimony. Stoltz did not mention any decline in the petroleum business, and Amoco never contended, nor could it have, that his testimony went to any industry instability. The appellate court's fact finding, weighing of facts, drawing inferences therefrom and failure to credit the district court's credibility findings are impermissible under Rule 52. Anderson, 470 U.S. at 574.

The inference the appellate court drew in the first paragraph of the circuit court opinion is that the energy crisis of the 1970's had some impact on Amoco's decision not to hire Bettye Heerdink. (App A-38) In fact the circuit court relied on this finding to draw its "more reasonable" inference, creating for Amoco an "economic climate" or energy crisis defense, totally unsupported by the record. (App A-44) This is a clear violation of Rule 52. Anderson, 470 U.S. at 577.

In any event, Stoltz's testimony about the old truck would not explain why Heerdink was not hired in September to drive the new truck. Letting the new truck sit makes no sense in view of Stoltz's testimony that the company planned to try to increase business by using the new truck to deliver more of

its products (Tr V. III, pp. 50-51), not--as the appellate court misunderstood--that Amoco expected an increase in business which did not materialize. Here the appellate court improperly found on appeal a critical fact not in the record to excuse its failure to defer to one of the district court's decisive credibility findings. Anderson, 470 U.S. at 574 and 577.

The appellate court opinion indicates the panel misunderstood Stoltz's "unfortunate experience with" Hall to explain a delay in hiring for Hall's truck even though the district court properly found only that because of "the Hall debacle, [Stoltz] abandoned any attempt to carry out" his affirmative action obligation. (App A-39, A-12 FF 24) The appellate court again failed to defer to the district court's finding.

Anderson, 470 U.S. at 574.

C. The appellate court erred in failing to uphold the district court's judgment based on a proper finding of pretext.

(1) The Supreme Court in Patterson held that a Title VII plaintiff's right to show pretext is not linked to certain kinds of proof.

Heerdink made her prima facie case under the formulation of Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), and McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). She was a truck driver experienced in driving varieties of heavy trucks, and driving heavy trucks was the employment offered by Amoco. The Seventh Circuit acknowledged that Heerdink met Amoco's minimum requirements by having 3,000 hours of driving experience and by having

passed a mandatory physical examination.[4] (App A-38-39, A-44 n. 6)

A plaintiff, bearing the overall burden of persuasion by a preponderance of evidence, must have a full and fair opportunity to show pretext, the third stage of the analysis under the disparate treatment theory. McDonnell Douglas, 411 U.S. at 805. Heerdink did exactly that by production of abundant unrebutted pretext evidence showing that a sexually discriminatory reason motivated Amoco and that its proffered reason for failing to hire Heerdink was not credible.

Patterson v. McLean Credit Union, 491 U.S. 164, 187 (1989), states plainly

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[4]The appellate court said that under U. S. Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983) it does not have to discuss the prima facie case, but may move on to rebuttal and the ultimate finding of discrimination. (App A-41-42)

that the evidence that a plaintiff may present in an attempt to establish that the defendant's stated reasons are pretextual may take a variety of forms. She is not required to show that she was better qualified to show pretext. 491 U.S. at 187-88.

(2) The appellate court erred in failing under 28 U.S.C. § 2111 to find harmless any error of the district court with respect to Amoco's rebuttal burden since Heerdink proved pretext.

A crucial error of the Seventh Circuit in depriving Heerdink of a judgment she had earned goes to burdens of proof in Title VII actions. The appellate court held that the district court imposed on Amoco at rebuttal a shifting burden of proof, rather than of production. (App A-42) It held this to be dispositive error. (App A-37) The

appellate court does acknowledge that the district court made pretext findings (App A-43; see also App A-16 FF 39, App A-23 CL 5; A-32), but it does not mention that the district court cited the controlling Supreme Court standards. (App A-22-23, A-25 et seq.)

The district court acknowledged that ". . . plaintiff retains the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff." (App A-26) The court further acknowledged that defendant's burden is to ". . . articulate some legitimate, nondiscriminatory reason for the hiring decision." (App A-27; see also App A-23 CL 3) The district court found, quoting from Burdine, that Defendant's burden is one of ". . . producing evidence that the plaintiff was rejected or someone else

was preferred for a legitimate nondiscriminatory reason." (App A-32) Thus the words "proof" and "proving" applied by the district court to Amoco at App A-28 and A-30 were mere inadvertence since the district court went on to find pretext under the third stage Burdine/McDonnell Douglas analysis. Thus the court at most committed harmless error. Finding pretext, the district court reached, correctly, the ultimate question of discriminatory intent.

A finding of intent is a factual finding and is to be given deferential review under Rule 52(a). Pullman-Standard v. Swint, 456 U.S. 273, 293 (1982).

It was incorrect for the appellate court to consider only whether burden of proof error was committed. The appellate duty is to affirm the judgment if the entire record makes this possible, and if

there is allocation of proof error to apply the harmless error test of 28 U.S.C. § 2111. This provision instructs the court to examine "the record without regard to errors or defects which do not affect the substantial rights of the parties." On appeal it was Amoco's burden to establish that the judgment of the district court should be reversed. Amoco took appeal complaining of burden of proof errors, but it made no argument whatsoever that the error was harmful since this required a showing that it was prejudiced in its substantial rights. Kotteakos v. United States, 328 U.S. 750, 760 (1948). Nor could it have, since it was not prejudiced.

Amoco had a full and fair opportunity at trial to state its defenses and to attempt to negate Heerdink's overwhelming pretext evidence.

Once trial was completed and Amoco failed to produce evidence negating Heerdink's pretext evidence, it was left with no way of showing on appeal that it had a substantial right infringed on by any improper allocation of burdens.

The district court's finding that Amoco's rebuttal failed did not change the pretext analysis and could not therefore affect the outcome of the case.

The court in United States Postal Service v. Aikens, 460 U.S. 711, 715 (1983) noted that "[w]here the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant." Similarly, when the district court found that Heerdink did everything required to show that what defendant offered on rebuttal was

pretextual, whether the defendant was successful on rebuttal was no longer relevant.[5]

D. The appellate court found facts on appeal not supported by the record or by Amoco's defenses.

While Amoco did introduce trial testimony concerning the slump in the oil industry, this testimony from William

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[5]The Circuit also faulted the district court for observing that Amoco ". . . failed to rebut plaintiff's prima facie case or otherwise show that the plaintiff was unqualified or that better qualified males were available in September, 1979." (App A-32; App A-44) The district court imposed on Amoco no burden of proving that better qualified males were available; if it had it would have been harmless error since Heerdink's compilations proved Amoco did not hire "better qualified" candidates under any standard that arose during the litigation. The district court ruled correctly that Amoco "had no practice or procedure to evaluate qualification[s] of applicants beyond the 3,000 hour/DOT standard." (App. A-14 FF 30) See Fortino v. Quaser Company, 751 F.Supp. 1305, 1316 (N.D. Ill. 1990). (See also Section D below.)

Albert, Amoco's Great Lakes Region Manager, Employee Relations in 1979, was offered by Amoco only to explain why Amoco did not increase total numbers of women drivers between 1977 and 1982. The appellate court's opinion indicated that the energy crisis and slump in the oil business was in some way related to Amoco's failure to hire Heerdink, but Amoco made no such defense.

The appellate court adopted Amoco's unsupported, vague defenses of longer driving experience and experience delivering to the Evansville terminal to explain why Stoltz did not hire Heerdink. (App A-44)

Amoco argued in its trial briefing that it had hired applicants who it claimed were better qualified by having longer driving experience. Heerdink's applicant/hire data compilation, entered

into evidence at trial, showed that it did not. (P Ex 37-A, 38-A, 39-A, 40-A, 42-A) Also, Stoltz testified that two applicants, Dike and Happe, were equally qualified even though in 1979 Happe had 16 years of truck driving experience and Dike had nine years. (Tr V. III p. 64 lines 6-8, p. 62 lines 19-22; Jt Ex 1, 8)

Stoltz at no time claimed he failed to hire Heerdink because she had less driving experience than other candidates and in fact listed experience as a skill he believed drivers needed to have and indicated Heerdink had that "skill". (Tr V. III p. 59 line 21-p. 60 line 13) Nor did Stoltz testify that he compared the length of Heerdink's driving experience with that of any of the men hired. (See also n. 5 above.)

The panel seemed to think that Amoco's hiring of white males who had

delivered to Amoco's terminals as drivers for other companies was a nondiscriminatory, discretionary practice because these drivers were alleged to be familiar with Amoco's procedures and paperwork. (App A-44) The panel found here facts not in the record. Testimony at trial indicated only that one of the three men hired, Rupp, had previously delivered to Amoco's terminal.

The evidence also shows that all new drivers at Amoco received the same orientation to Amoco procedures irrespective of whom they worked for previously or whether they had delivered to Amoco. (App A-10 FF 19; Tr V. I p. 41 lines 4-15; Tr V. II p. 72 line 23-p. 73 line 3; Tr V. III p. 56 lines 13-19) Employers do have the discretion to employ any recruiting methods they choose in the absence of discrimination.

However, when word of mouth recruiting perpetuates an all white male workforce it is evidence of discrimination. United States v. United Brotherhood of Carpenters, 457 F.2d 210, 215 (7th Cir. 1972), cert. denied, 409 U.S. 851 (1972). (See App A-19 FF 49)

The appellate court erroneously decided that the district court replaced Amoco's business judgment with its own. (App A-43-45) The appellate court, not the district court, replaced Amoco's business judgment with its own. Gene Stoltz, the hiring manager, at no time said he did not consider or hire Heerdink because of any deficiency in the amount of her over-the-road experience. Nor did Stoltz say at any time that he did not consider or hire Heerdink because of any defect in her experience with respect to the paperwork she had done elsewhere as a

heavy truck driver compared to the paperwork someone else may have observed at Amoco. The only reason Stoltz gave for not hiring Heerdink was that he preferred someone with prior petroleum hauling experience. The district court did not believe him. (See Section B above; see also Section A above.)

E. The appellate court failed to affirm the judgment on the basis of Heerdink's strong statistical evidence and Amoco's violation of its affirmative action contract with the OFCCP.

McDonnell Douglas, 411 U.S. at 805, grants Heerdink the right to produce statistics as to Amoco's employment policy and practice in order to determine if Amoco's refusal to consider and hire her conformed to a general pattern of discrimination against women.

Heerdink's statistics showed that Amoco had not hired a permanent qualified female driver from July 2, 1965, the effective date of Title VII through September, 1979 when Heerdink was rejected in the Great Lakes Marketing Region. (App A-12 FF 25; P Ex 23, 23, 33-C) This is unlawful segregation of a workforce under 42 U.S.C. § 2000e-2(a)(2). (App A-2) It is also inexorable zero evidence, the strongest possible statistical evidence which this Court took notice of in Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616 (1987).

Heerdink's statistics showed gross disparity in the number of women employed in Amoco's truck driving workforce compared to general workforce and operative workforce workpools. (P Ex 33-C, 50-A; Appendices X and XI to Pl's

Proposed Findings of Fact served August 5, 1988) Amoco entered no defense to Heerdink's statistics; thus Heerdink prevailed on her general policy evidence. Amoco could not enter any statistical rebuttal evidence because one of Petitioner's workpool comparisons was the specific comparison this Court set out for truck driving cases. See Hazelwood School Dist. v. U.S., 433 U.S. 299, 308 n. 13 (1977). And Heerdink was a member of all workforce pools which Amoco claimed to OFCCP were relevant.

Amoco offered the testimony of William Albert, who was in 1979 Amoco's Manager, Employee Relations for the Great Lakes Region, in order to show that its hiring of truck drivers was minimal during the "relevant" time period in Indiana and its Great Lakes Region. (Defendant's Contentions, April, 1988, p.

4 Nos. 18, 19) Albert testified that Amoco's truck driving workforce was reduced by 38 percent in the 1977-1982 period because of a downturn in the petroleum industry and other factors. (Tr V. III pp. 31-35) He testified that 26 drivers were hired in Indianapolis at the same time. Id. (See also pp. 23-24 above)

Heerdink's unrebutted statistics were important for a reason other than showing pretext: a personal-burden-of-proof difference. Like the plaintiffs in Lams v. General Waterworks Corp., 766 F.2d 355 (8th Cir. 1985), Heerdink was qualified to drive an Amoco truck; Stoltz testified she would have made a good driver. (Tr V. III p. 60 lines 6-13) Also like the Lams plaintiffs, Heerdink proved that there was a segregated workforce from which female drivers were systematically excluded. 766 F.2d at 391.

Once a segregation policy is proved the McDonnell Douglas analytic framework no longer controls and the trial judge cannot "focus on the reasons" Stoltz and Amoco "gave at trial for preferring [their] handpicked candidates over" Heerdink. 766 F.2d at 393.

The district court found that Heerdink was not considered for hire because of her sex (App A-7, 15, 16 FF 7, 34, 39), so that Amoco's comparisons between her and three men hired at Evansville were post hoc. 766 F.2d at 393. Her qualifications were not considered in 1979, but Stoltz admitted post hoc at trial he believed she would have been a good driver for Amoco. Heerdink proved that Amoco had a policy of reserving its driving jobs for men so that sex segregation was the company's standard operating procedure. Cox v.

American Cast Iron Pipe Co., 784 F.2d 1546 (11th Cir. 1986). Cox applies the burden of proof teaching of this Court in two well known truck driving cases. 784 F.2d at 1559. Once a pattern or practice of discrimination was demonstrated and went unrebutted, the burden shifted to Amoco to prove that the plaintiff was not a victim of discrimination. The district court held that Heerdink was well qualified (see pp. 18-20 above); Stoltz testified she would have made a good driver. (Tr V. III p. 60 lines 6-13) Taken along with all the other evidence, it is clear Amoco did not prove that its failure to consider Heerdink was for a reason other than its customary policy of excluding female drivers. Heerdink produced this theory at trial and the Circuit should have affirmed the judgment on that basis also.

As to its violation of its affirmative action plan contract, Amoco offered no evidence to explain or attempt to explain why it provided OFCCP with erroneous information. (See pp. 14-15, 24-25 above.) In the absence of such proof, the inference is that Amoco determined it was not going to end male segregation of its driving force. Amoco's violation of its own affirmative action plan was uncontroverted. This egregious breach of contract with the OFCCP constitutes further supporting pretext proof. Gonzales v. Police Dept. of San Jose, Cal., 901 F.2d 758, 760 (9th Cir. 1990), citing Yatvin v. Madison Metro School Dist., 840 F.2d 412, 515-16 (7th Cir. 1988).

CONCLUSION

For the reasons stated above, Petitioner requests that her Petition for

Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

Pertinent portion of Rule 52(a), Federal Rules of Civil Procedure:

* * *

> Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

* * *

Pertinent portions of Title VII of the Civil Rights Act of 1964, 42 USC §2000e-2(a):

> (a) It shall be an unlawful employment practice for an employer--
> (1) to fail or refuse to hire . . . any individual . . . because of such individual's . . . sex . . . .
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex . . . .

28 USC § 2111:

> § 2111. Harmless error
>
> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

BETTYE HEERDINK,	)	
	)	
Plaintiff,	)	
	)	CAUSE NO.
vs.	)	EV 81-144-C
	)	
AMOCO OIL CO.	)	
	)	
Defendant,	)	

JUDGMENT

The Court, having this day filed its Entry in the above matter in the following words and figures, to-wit:

(H. I.)

now, therefore,

IT IS CONSIDERED AND ADJUDGED that plaintiff have judgment on her complaint in the sum of Thirty-Six Thousand Seven Hundred Thirty-Four Dollars and Eighty Cents ($36,734.80), prejudgment interest in the sum of Fifty-Four Thousand Two Hundred Twenty-Three Dollars and Sixty Cents ($54,223.60), attorneys' fees in a

sum to be determined, and the costs of this action.

Dated this 20th day of July, 1989.

/s/ J. Patrick Endsley
Magistrate
United States District Court
Southern District of Indiana

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

BETTYE HEERDINK,	)	
	)	
Plaintiff,	)	
	)	CAUSE NO.
vs.	)	EV 81-144-C
	)	
AMOCO OIL CO.,	)	
	)	
Defendant,	)	

ENTRY[1]

This matter came on for trial without intervention of a jury on June 6, 1988 before the undersigned United States Magistrate upon consent of the parties and reference from the Honorable Gene E. Brooks, Chief United States District Judge, Southern District of Indiana. The cause was submitted and evidence heard. Both parties having rested, the matter

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[1]This is the full text of the District Court's June 30, 1989 entry except that the actual calculations of damages have been ommitted since those calculations are not at issue herein and are lengthy.

was taken under advisement. The parties have subsequently submitted their post-trial briefs and supplemental proposed findings of fact and conclusions of law. The Court being duly advised on the premises now submits its ruling.

The Court makes the following Findings of Fact:

Findings of Fact

1. Defendant, Amoco Oil Company ("Amoco"), is a Maryland corporation doing business in the City of Evansville and at other locations in the State of Indiana.

2. Plaintiff, Bettye Heerdink, is a female adult.

3. On July 23, 1979, plaintiff applied for a transport truck driver position at Amoco's Evansville Terminal.

4. Between July and December, 1979 there were three (3) job openings at the

terminal for transport truck drivers.

5. There were seven (7) applicants in the July, 1979 period and another three (3) applicants, solicited directly or indirectly by management, in the November-December, 1979 time frame.

6. Plaintiff was not hired for any of the three (3) openings.

7. Plaintiff was not even considered for the two openings filled in December, 1979.

8. Plaintiff timely filed a charge of sex discrimination with the Evansville Human Relations Commission; hearings were held and a report issued.

9. On March 31, 1981, the Equal Employment Opportunity Commission issued a "Right to Sue" letter to plaintiff and this suit was timely commenced.

10. Plaintiff has exhausted her administrative remedies and this cause is

properly before the Court.

11. Amoco is engaged in the business of processing, distributing, and selling petroleum products. During the period in question, Amoco used trucks to transport its petroleum products to customers and between various locations. Those truck drivers work out of distribution centers and terminals located throughout the United States, including Evansville, Indiana. Each terminal operated autonomously of other terminals. There was no centralized hiring of truck drivers.

12. Bettye Heerdink had more than three (3) years experience as a heavy truck driver when she applied for employment with Amoco. Her on the job experience included driving grain trucks, farm tractors, tri-axles, 18-wheel tractor-trailers, and flatbeds; she

hauled in the tri-axles hot asphalt for blacktop highways, concrete for concrete slabs in highways, and coal from stripped pits; she hauled in an 18-wheeler tractor-trailer with dump beds, coal, rock, and lime; and other loads that could be chained flat. Plaintiff hauled oversized loads carrying coal-crushers or rail siding.

13. Mrs. Heerdink's experience included cargo that presented complex, difficult and/or dangerous jobs for a truck driver.

14. Plaintiff had no experience hauling liquid petroleum or other explosive or flammable products, but met the minimum job requirements of three thousand (3,000) hours of truck transport experience and a passing grade on the United States Department of Transportation ("D.O.T.") test.

15. In July, 1979, Bettye Heerdink had taken and passed the DOT test on two occasions.

16. Plaintiff had substantial over-the-road truck driving experience in July, 1979.

17. Amoco's terminal manager in Evansville, Indiana accepted plaintiff's application at which time he told plaintiff she met Amoco's requirements for transport truck drivers; he told her she could check back to see if there were openings.

18. Defendant took seven (7) applications for the opening at the Evansville terminal. Six (6) were males, one of the males was black. Plaintiff was the only female.

19. The terminal manager advised plaintiff that if Amoco decided to consider her she would be placed with

another driver for a short period of time to familiarize her with a tank truck and introduce her to Amoco's product.

20. Defendant's affirmative action plan required the company to consider qualified minority and female applicants in order to integrate the company work force. A company Equal Opportunity officer had counselled with the terminal manager concerning this goal.

21. Mr. Hall, a black male, was hired in August, 1979. On paper, Mr. Hall was more experienced than plaintiff and he had hauled liquid petroleum.

22. Mr. Hall stayed with the company less than one (1) month due to serious emotional problems.

23. Although the Hall termination left an opening, the terminal management took no steps to reconsider the other remaining applicants.

24. Although Amoco's corporate goal was to give protected groups employment opportunities, the terminal manager felt he had done his part and after the Hall debacle, he abandoned any attempt to carry out the recommended hiring practices.

25. Amoco had a practice of allowing an all-male managerial work force total discretion to hire any applicant meeting Amoco's requirements, (i.e. 3,000 hours driving experience and ability to pass DOT exam) and to exercise whatever personal subjective preferences they had in selecting applicants for hire, thereby totally excluding women, including the plaintiff.

26. Although the terminal manager claimed to be looking for a qualified minority person or a woman, he treated plaintiff and Hall differently; he gave

Hall preferential treatment; he checked Hall's references; he offered Hall a job without requiring him to drive, while not allowing plaintiff an opportunity to show she could drive; he offered Hall, but not plaintiff, a job instead of Mr. Dike, whom he contends he considered more qualified than Hall. Amoco's terminal manager asserted that plaintiff would have needed extensive training, while it in fact gave Mr. Hall more than two weeks' training.

27. In his eagerness to satisfy the company's Senior Employee's Relations Representative, the affirmative action counselor, the terminal manager hired Mr. Hall without an adequate background check.

28. The terminal manager was defendant's agent in making all hiring decisions and the defendant is bound by

his actions.

29. No investigation or background check was made of plaintiff nor were her qualifications challenged. She was not seriously considered by the terminal manager and her application was apparently unknown to the Employee Relations Representative.

30. Defendant had no practice or procedure to evaluate qualification of applicants beyond the 3,000-hour/DOT standard.

31. Mr. Hall met the basic requirements and was a member of a protect[ed] class which was unrepresented [i]n the Evansville work force.

32. Mrs. Heerdink met the basic requirements and was a member of a protected class which was not represented in the Evansville work force.

33. Mr. Hall was preferred over Mrs. Heerdink because he was male.

34. Mrs. Heerdink was not seriously considered because she was female.

35. After Mr. Hall's termination, Mrs. Heerdink was not considered for the existing vacancy or for the new job created by the purchase of a new rig. The new rig purchase was known to terminal personnel prior to July 23, 1979.

36. The terminal manager directly or indirectly solicited applications for the November, 1979 openings, and hired two (2) white males for the positions.

37. Defendant hired the following persons at its Evansville terminal after plaintiff applied:

Name	Date of Application	Date of Hire	Termination Date
William Hall	07/18/79	8/27/79	09/24/79
Larry Happe	11/20/79	12/17/79	04/30/83

George Rupp 11/27/79 12/10/79 04/30/83

38. Mr. Rupp and Mr. Happe were terminated on April 30, 1983 when Amoco discontinued its transport truck fleet operations at its Evansville terminal and all transport drivers in Evansville were terminated at that time.

39. The terminal manager's preference for applicants with petroleum handling experience was a subterfuge to justify his refusal to consider the plaintiff. His real reason for not hiring plaintiff was her sex. Defendant's agent was granted full authority to determine who to hire. His reliance on subjective "preferences" which adversely impacted on plaintiff is unacceptable and discriminatory.

40. Defendant had done no analysis or study as of November 20, 1986 regarding the safety records of truck

drivers hired by Amoco who had petroleum hauling experience compared with the safety records of truck drivers hired by Amoco who did not have petroleum hauling experience.

41. The accident reports from Amoco's Evansville and Indianapolis terminals show no relationship between petroleum hauling experience prior to an accident and an accident and specifically no relationship whatever between serious chargeable accidents and petroleum hauling experience, which could in any way support any safety or other business necessity.

42. The Amoco drivers involved in the two serious chargeable accidents reported at defendant's Indianapolis terminal were both drivers experienced in hauling petroleum.

43. Plaintiff had an unblemished safety record.

44. Amoco's terminals operated independently of each other, thus hiring officials at Indianapolis, where several women were employed, did not know about or consider plaintiff for employment.

45. The total number of male petroleum truck drivers employed at the Evansville terminal from 1978-1983 were:

1978	8
1979	7 then 8
1980	8
1981	8 then 6
1982	6 then 5
1983	5 then 0

No female petroleum truck drivers were employed at the Evansville terminal.

46. All of the employees at the Evansville terminal from 1969-1985, including mechanics, clerks, terminal men, utility men, drivers and managers, were male.

47. Region Manager Stultz delegated

equal employment opportunity responsibility to terminal managers, but the Evansville terminal manager was unaware of the affirmative action plan and did not know who had such responsibility at the Evansville terminal.

48. No central corporate authority was watching the store.

49. Defendant made no contact with women or black groups as part of a recruiting effort for the open positions but used as "word of mouth" device among the all-male work force and other drivers who frequented the terminal.

50. The defendant's corporate policy was to implement its various affirmative action plans. However, the urgency of the implementation failed to penetrate to the operational level at the Evansville terminal.

51. The terminal manager failed to hire Mrs. Heerdink to fill the vacancy created by the termination of Mr. Hall on September 24, 1979. The manager intentionally discriminated against the plaintiff because of her sex.

52. Had defendant's agent not discriminated against plaintiff she would have become an employee with a date of hire no later than October 1, 1979.

53. Mrs. Heerdink would have been terminated at the time the terminal ceased employing company drivers on April 30, 1983. Mrs. Heerdink is entitled to recover against defendant for its discriminatory hiring policy.

54. To determine the amount of back pay to which Bettye Heerdink is entitled, the Court must determine the difference between the wages Bettye Heerdink received from October 1, 1979 until April

30, 1983 and what she would have earned at Amoco but for its discriminatory policy.

* * *

55. Plaintiff has lost at least Thirty-Six Thousand Seven Hundred Thirty-Four Dollars and Eighty Cents ($36,734.80) in gross wages for the time period October 1, 1979 through April 30, 1983. Plaintiff has lost fringe benefits in the sum of Five Thousand Three Hundred Sixty-Nine Dollars and Ninety-Five Cents ($5,369.95) for the period of January 1, 1981 through April 30, 1983, calculated at the rate of twenty percent (20%) of the lost wages for the calendar years 1981, 1982 and 1983.

56. The plaintiff is entitled to prejudgment interest based upon the rates established by the Internal Revenue Service pursuant to 26 U.S.C. §6621. The

rates are as follows:

* * *

compounded quarterly on the sum due and owing at the end of the quarter.

57. The Court calculates the prejudgment interest as follows:

* * *

Total Interest $54,223.60

58. If necessary to sustain the judgment herein, any finding of fact shall be construed to be a conclusion of law and any conclusion of law a finding of fact.

Conclusions of Law

1. Title 42 U.S.C. §2000e, Title VII of the Civil Rights Act of 1964, and 28 U.S.C. §1331 confer jurisdiction over the parties and the subject matter of the action.

2. The plaintiff has established a prima facie cause of action under the

principles of McDonnell v. Green, 411 U.S. 792 (1973) and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1980).

3. The defendant has failed to articulate a legitimate nondiscriminatory reason for its failure to consider or employ the plaintiff after the termination of Mr. Hall.

4. The defendant failed to implement its existing affirmative action plan, thus allowing individual management employees unrestricted authority.

5. The "preference" of the terminal management for prior petroleum transport experience was a pretext to eliminate female applications such as plaintiff.

6. The plaintiff was not hired because of her sex, to-wit, female.

7. The law is with the plaintiff and against the defendant.

8. The plaintiff is entitled to back pay and the value of lost fringe benefits from October 1, 1979 through and including April 30, 1983 in the sum of Thirty-Six Thousand Seven Hundred Thirty-Four Dollars and Eighty Cents ($36,734.80) and pre-judgment interest in the sum of Fifty-Four Thousand Two Hundred Twenty-Three Dollars and Sixty Cents ($54,223.60).

9. Plaintiff is entitled to attorney fees in an amount to be determined by the Court following a hearing on this issue. Plaintiff shall submit her petition for fees on or before August 4, 1989. 42 U.S.C. §2000e-5(k).

10. The plaintiff is entitled to an award of costs in this action.

Dated this 30th day of June, 1989.

/S/J. Patrick Endsley
Magistrate
United States District Court
Southern District of Indiana

MEMORANDUM

This is an action brought pursuant to 42 U.S.C. § 2000e, commonly called Title VII, asserting sex discrimination in hiring.

It is an unlawful employment practice under Title VII of the Civil Rights Act of 1964 for an employer, "to fail or refuse to hire or otherwise to discriminate. . .because of such individual's. . .sex." 42 U.S.C. §2000e-2(a).

Title VII further provides:

> Nothing contained in this subchapter shall be interpreted to require any employer. . .to grant preferential treatment to any individual. . .because of sex. . .on account of any imbalance which may exist with respect to the total number or percentage of persons of any. . .sex. . .employed by any employer. . .in comparison with the total number or percentage

> of persons of such. . .
> sex. . .in any community. . .or
> in the available work force
> . . . .

42 U.S.C. §2000e-2(j).

In an action for sex-based discrimination in employment brought pursuant to Title VII, the plaintiff retains the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff." Burdine, 450 U.S. at 253; see also Nellis v. Brown County, 772 F.2d 853 (7th Cir. 1983). The basic allocation of burdens and order of presentation of proof in Title VII actions were set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and reiterated in Burdine. The plaintiff has the initial burden of proving by a preponderance of the evidence a prima facie case of discrimination. Once the plaintiff

establishes a prima facie case, the burden shifts to the defendants "to articulate some legitimate, nondiscriminatory reason" for the hiring decision. If the defendant succeeds in rebutting plaintiff's prima facie case, the plaintiff must then demonstrate by a preponderance of the evidence that the legitimate reasons advanced by the defendant are mere pretext for discrimination. Burdine, 450 U.S. at 256; McDonnell Douglas, 411 U.S. at 802-804; accord, United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, (1983).

As part of her prima facie case, the plaintiff is required to establish 1) that she belongs to a protected class under the act, 2) that she was qualified for the job for which she applied, 3) that despite her qualifications she was

rejected, and 4) that the job remained open or was filled by a person of equal or less qualifications. McDonnell Douglas, 411 U.S. at 802; Burdine, 450 U.S. at 248; Holder v. Old Ben Coal Co., 618 F.2d 1198 (7th Cir. 1980).

If plaintiff establishes a prima facie case, the burden of proof then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the applicant's rejection. McDonnell-Douglas, 411 U.S. at 802. Plaintiff then has the opportunity to establish that the reasons proffered by defendant were merely pretextual and that the real reasons were impermissible and discriminatory.

The Court has determined that plaintiff's qualifications were equal to or greater than those of the other applicants.

Congress did not intend, by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the act does not command that any person be hired simply because she was formerly the subject of discrimination or because she is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of sex or other impermissible classification. Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971).

Herein, we hold that the plaintiff has made a prima facie showing of employment discrimination. This Court further holds that the defendant has

failed to meet its burden of rebutting plaintiff's showing by proving a legitimate nondiscriminatory business reason for preferring to hire the male applicants instead of the plaintiff. The defendant's evidence failed to show any objective standards of job qualifications which were uniformly applied to all applicants.

As Judge Swygert noted in his dissent in Holder, 618 F.2d at 1203:

> [Q]ualifications, however job related, must be uniform for all applicants in any particular job category, or else so-called qualifications can be required or not, depending on illegitimate criteria such as the sex or race of the applicant. If the Court permits a job applicant to be called 'unqualified' for not possessing a quality that is not required of all applicants, no prima facie case can be made.

Herein, the evidence shows that the plaintiff met the two required criteria

but that plaintiff failed to meet the terminal manager's "preference" of prior petroleum [hauling] experience. The defendant hired Mr. Hall, who was black, but refused to consider plaintiff after Hall departed. Had Mrs. Heerdink been properly considered for the September opening, this Court believes she would have been hired. Instead, the defendant's agent left the job open until he found a white male who would make an application. Defendant's explanation of its reasons for leaving the job open for ninety (90) days and for its selection of the two (2) white males in December, 1979 is not credible.

Employment criteria that are shown to be preferred, rather than required, cannot be termed qualifications for purpose of excluding an applicant and, in any event, they must be uniformly applied

to all applicants.

As stated in Burdine, 450 U.S. at 254:

> The burden that shifts to the defendant. . .is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason.

Clearly, the reasons stated by the defendant were a pretex[t]. The defendant has further failed to rebut plaintiff's prima facie case or otherwise show that the plaintiff was unqualified or that better qualified males were available in September, 1979.

The evidence convinces the Court that defendant's terminal manager's "preferences" and his disregard for the implementation of the affirmative action plan resulted in an intentional, discriminatory hiring policy which is barred by the statute.

The Court finds plaintiff's statistical analysis to be informative but not persuasive of a company-wide policy of discrimination. The company's failure was in allowing the terminal's autonomy in implementing the program. The evidence strongly suggests that the program was vigorously pursued at Indianapolis. It is unfortunate that the same degree of interest was not shown at Evansville. In Wards Cove Packing Company, Inc., et al. v. Atonio, #87-1387 (U.S. June 5, 1989) (WESTLAW, 1989 WL 60000), the United States Supreme Court greatly restricted the application of general population and labor force statistics in disparate impact cases. Such statistical applications are not required under the facts established in this cause.

"Title VII authorizes prejudgment interest as part of the backpay remedy...." Loeffler v. Frank, __U.S.__, 108 S.Ct. 1965, 1970 (1988); Taylor v. Philips Industries, Inc., 593 F.2d 783, 787 (7th Cir. 1979).

The purpose of prejudgment interest is to restore the plaintiff to the position she would have been in but for the wrongful conduct of the defendant. The rate to be applied is to be determined in the sound discretion of the Court. E.E.O.C. v Wooster Brush Company Employees Relief Association, 727 F.2d 566 (6th Cir. 1984). The adjusted prime rate established by the Internal Revenue Service is fast becoming the preferred rate for such calculation. See E.E.O.C. v. Cook County Dept. of Corrections, 47 F.E.P Cases 1674 (N.D. Ill. 1987) (WESTLAW, 1987 WL 11333); Walters v. City

of Atlanta, 610 F. Supp. 715, 728 (N.D. Ga. 1985). Several methods of interest calculation exist. The Court has adopted the formula set out in Walters:

> The interest is calculated from the end of each calendar quarter, on the amount then due and owing. Fadhl v. Police Department of the City and County of San Francisco, 553 F. Supp. 38 (N.D. Cal. 1982); see Florida Steel Corp., 96 L.R.R.M. 1070, 1072 (1977) (NLRB rule: "we shall require that backpay be computed utilizing the Woolworth formula [F.W. Woolworth Co., 26 L.R.R.M. 1185 (1950)], with interest to accrue commencing with the last day of each calendar quarter of the backpay period on the total amount then due and owing at the 'adjusted prime rate' then in effect and continuing at such rate, as modified from time to time by the Secretary of the Treasury)." The Eleventh Circuit, in considering the question of when back pay accrues under Title VII, has adopted the NLRB quarterly earnings formula. Darnell v. City of Jasper, 730 F.2d 653, 656-657 (11th Cir. 1984). Since the Eleventh Circuit has concluded that back pay itself accrues on a quarterly basis, then the award of prejudgment

> interest on the back pay amount should also.

Id. at 728.

This Court has found no Seventh Circuit cases to guide its exercise of discretion but adopts the quarterly calculation of interest, even though it is unable to calculate quarterly wage/loss, as it appears to be the fairest method available.

In the
United States Court of Appeals
For the Seventh Circuit

No. 89-2596

BETTYE HEERDINK,

Plaintiff-Appellee,

v.

AMOCO OIL COMPANY,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Indiana, Evansville Division.
No. 81 C 144—J. P. Endsley, *Magistrate.*

ARGUED JANUARY 24, 1990—DECIDED DECEMBER 10, 1990

Before BAUER, *Chief Judge*, RIPPLE and KANNE, *Circuit Judges.*

KANNE, *Circuit Judge.* Bettye Heerdink believes that Amoco Oil Company failed to hire her when she applied for a truck driver position because she is a female. After Amoco hired three male drivers instead of Heerdink at their terminal in Evansville, Indiana, she filed a complaint alleging that Amoco intentionally discriminated against her because of her sex in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.* The district court found that Amoco intentionally discriminated against Heerdink. Because we believe that there was error in the allocation of the burden of proof to the defendant and that the trial record fails to support the findings of dispositive facts, we reverse.

I.

The energy crisis of the 1970s precipitated national efforts at energy conservation. Businesses and residents were encouraged to keep their thermostats below 65 degrees, the auto industry focused their efforts on developing smaller automobiles with better gas mileage, and the overall demand for petroleum products shrank as prices increased. The impact on Amoco was significant; their marketing and manufacturing businesses suffered substantial reductions, consequently, the demand for truck drivers in petroleum transport also declined. Amoco did not replace truck drivers who retired or resigned and some layoffs also were imposed. The Great Lakes region, including the terminal at Evansville, Indiana, experienced an overall reduction of 38% in the Amoco truck driver work force between 1977 and 1982. It was in this economic climate that Bettye Heerdink chose to apply for a truck driving position with a petroleum company.

Amoco decided to expand their Evansville terminal by one additional truck in the fall of 1979; two drivers were to be hired. Amoco permits terminal managers broad discretion in determining who, among those applicants who meet the minimum requirements for consideration, will be hired. Gene Stoltz, the terminal hiring manager at Evansville, hired one driver (William Hall) at the end of August, 1979 who was released within a month. Because of the unfortunate experience with this first hire and because an anticipated increase in petroleum transport activity did not materialize, Stoltz chose to wait until December, 1979 before hiring any additional drivers.

On July 23, 1979, Bettye Heerdink applied for a petroleum transport truck driver position with Amoco at the Evansville terminal. Amoco requires that all petroleum transport applicants have a minimum of 3,000 hours of truck driving experience and pass a Department of Transportation physical examination to qualify for consideration. Heerdink met the minimum requirements; she had three years of truck driving experience and had passed the DOT

physical examination. However, she had never hauled petroleum or any other liquids or flammable cargo. Her application was retained by Amoco at least through the end of 1979.

Heerdink testified that Stoltz told her "he would consider someone with experience before he would consider her."[1] (Tr. vol. I at 44.) William Hall was hired on August 27, 1979. Hall had seven years of petroleum transport experience and had driven for Coastal Truck Lines where he gained experience with Amoco's terminal loading and unloading procedures, paperwork and locations. At the time of Hall's hiring, Amoco retained seven applications on file. Of the seven applicants considered in August, Heerdink was the only female and Hall was the only black. Amoco hired Hall because of his extensive driving experience, particularly in petroleum transport, and because he was a highly qualified minority applicant.[2] Amoco dismissed Hall soon after he was hired because of problems in performance.

Three more applicants applied for positions in November, 1979; all three applicants were males. In November or December of 1979, Amoco offered a position to applicant Allen Dike whose application had been retained on file since he originally submitted it in 1975. Like Hall, Dike had driven petroleum transports for at least six years and had experience with Amoco's terminal loading

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[1] Although there was some dispute as to whether Stoltz told Heerdink this in August or after December, there was no factual determination on this issue. The timing of such a comment would go to the question of pretext; if the comment was made after December it might be more likely that such a comment was pretextual and created to "explain" the hiring of the two males when Heerdink challenged the hirings as discriminatory.

[2] The district court found that Mr. Hall was preferred over Mrs. Heerdink because he was a male, however, this conclusion is undercut by its other findings that "Mr. Hall **was more experienced than plaintiff** and he had hauled liquid petroleum." (Emphasis added).

and unloading procedures, paperwork and locations. Stoltz originally had offered the position to Hall instead of Dike in July of 1979 to further the goals of Amoco's affirmative action program. Although Stoltz considered Dike to be at least as qualified as Hall, he did not offer Dike a position after Hall was dismissed until the position had been left vacant for more than two months.[3] Dike refused the November/December offer of employment from Amoco. Amoco subsequently offered the position to George Rupp, a driver with eight years of petroleum transport experience and familiarity with Amoco's terminal loading and unloading procedures, paperwork and locations. Amoco also offered a position to Larry Happe who had driven petroleum transports for sixteen years. Rupp and Happe applied for positions in November of 1979; at that time, Amoco had on file eight applications.

II.

This is a case of disparate treatment.[4] The Supreme Court developed a framework for allocating burdens of proof in a Title VII disparate treatment case. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973). The plaintiff carries the initial burden to prove by a preponderance of the evidence the prima facie case of discrimination. This burden is not onerous, but plaintiff must show that "(i) she belongs to a minority; (ii) she applied and was qualified for a job for which the employer was seeking applicants; (iii) that despite her qualifications she was rejected and; (iv) that after her rejection, the

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[3] It is unclear, given this fact, what the basis was for the finding below that absent any discrimination Heerdink would have been hired no later than October 1, 1979. Dike would not have been hired until November and he, because of his record of experience, was more qualified that Heerdink.

[4] The district court found that Stoltz' reliance on subjective "preferences" which **adversely impacted** on plaintiff was unacceptable and discriminatory. (Emphasis added.) However, as we noted this is a disparate treatment case—not an adverse impact case.

position remained open and the employer continued to seek applicants from persons of plaintiff's qualifications." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S. Ct. 1089, 1094 (1981) (quoting *McDonnell Douglas*, 411 U.S. at 802, 93 S. Ct. at 1824 (1973)). The prima facie case raises an inference of discrimination for which defendant carries a burden of rebuttal; defendant need only articulate a legitimate, nondiscriminatory reason for the employee's rejection to successfully rebut this inference. *Id.* The plaintiff then has the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were a pretext for discrimination. *McDonnell Douglas*, 411 U.S. at 804, 93 S. Ct. at 1825. This burden of proof carried by plaintiff merges with the ultimate burden of persuading the court that the plaintiff has been intentionally discriminated against. *Burdine*, 450 U.S. at 257, 101 S. Ct. at 1095. "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Id.* at 253, 101 S. Ct. at 1093.

In a Title VII disparate treatment case, "[t]he allocation of burdens and the creation of a presumption by the establishment of a prima facie case is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." *Id.* at 253 n.8, 101 S. Ct. at 1094 n.8. The Supreme Court has said that "where the defendant has done everything that would be required of him if the plaintiff made out a prima facie case, whether plaintiff really did so is no longer relevant." *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 715, 103 S. Ct. 1478, 1482 (1983); *see also Kier v. Commercial Union Ins. Cos.*, 808 F.2d 1254, 1257 (7th Cir. 1987) ("After a trial on the merits, 'disputes about the underlying prima facie case fall away.' ") (quoting *Morgan v. South Bend Community School Corp.*, 797 F.2d 471, 480 (7th Cir. 1986)). At trial, Amoco presented the evidence they deemed necessary to rebut a prima facie inference of intentional discrimination. Thus, in this opinion we will not discuss the prima facie case, *see McCluney v. Jos.*

Schlitz Brewing Co., 728 F.2d 924 (7th Cir. 1984) (court will not consider whether district court erred in determination of prima facie case where both sides offered evidence and district court had enough evidence to decide ultimate issue of intentional discrimination); but will focus on defendant's rebuttal and the ultimate question of intentional discrimination.

A.

The district court erroneously placed a burden of proof upon defendant at the rebuttal stage stating that "defendant has failed to meet its **burden** of rebutting plaintiff's showing by **proving** a legitimate nondiscriminatory business reason for preferring to hire the male applicants instead of the plaintiff . . . . If the plaintiff establishes a prima facie case, the **burden of proof** then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the applicant's rejection." (Emphasis added.) The district court incorrectly assumed that defendant's burden of rebuttal carried with it a burden of proof; the defendant only bears a burden of production. *Burdine*, 450 U.S. at 253, 101 S. Ct. at 1094. As the Supreme Court stated, "defendant bears only the burden of explaining clearly the nondiscriminatory reasons for its actions." *Id.* at 261, 101 S. Ct. at 1097. It is sufficient if the employer produces evidence which raises a genuine issue of fact as to whether it discriminated against the plaintiff. *Id.* As this court has said before, "[a] desire to hire the more experienced . . . applicant is a nondiscriminatory, legitimate, and common reason on which to base a hiring decision." *Holder v. Old Ben Coal Co.*, 618 F.2d 1198 (7th Cir. 1980). In this case, defendant successfully rebutted the prima facie inference of intentional discrimination by clearly explaining that Amoco offered positions to Hall, Dike, Happe and Rupp because they had more truck driving and petroleum transport experience than Heerdink.[5]

[5] We will not address the arguments put forth concerning the relationship between experience and safety since this court has

(Footnote continued on following page)

B.

A pretext may be shown "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256, 101 S. Ct. at 1095. The court below found that Amoco's reasons for not hiring Heerdink were a pretext for discriminating on the basis of sex. It concluded that Stoltz' preference for prior petroleum transport experience was a pretext to exclude female applicants such as plaintiff, and that Stoltz' explanation of his reasons for leaving the job open for ninety (90) days and for his selection of the two (2) white males in December, 1979 was not credible. We find that the evidence does not support either conclusion.

In this case, the district court determined that Heerdink was better qualified than the other applicants; but the evidence shows that Heerdink met only the *minimum* job requirements and that she had no experience hauling liquid petroleum or other explosive or flammable products. To conclude, based on the evidence presented, that Heerdink was equally or better qualified than those who were offered positions would require a relative weighing of her subjective qualifications by the district court. However, the courts do not "sit as a super-personnel department" or "determine whether the employer exercised prudent business judgment." *LaSalle Nat. Bank v. County of Du Page*, 856 F.2d 925 (7th Cir. 1988), *cert. denied*, ____ U.S. ____, 109 S. Ct. 1536 (1989) (quoting *Dale v. Chicago Tribune Co.*, 797 F.2d 458, 464 (7th Cir. 1986), *cert. denied*, 479 U.S. 1066, 107 S. Ct. 954 (1987)). Review of job applications necessarily involves relative comparisons of objective and subjective qualifications, but such review is the domain of employers and not the courts. With re-

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[5] *continued*
made clear its position on the role of experience as an acceptable reason for hiring in a Title VII disparate treatment case. *See Holder*, 618 F.2d 1198.

spect to three measurable objective qualifications, specifically, each applicant's total truck driving experience, petroleum hauling experience and whether the applicant was experienced with Amoco's procedures and paperwork, Heerdink obviously was not as qualified as the others who were offered positions. It is not appropriate for the courts to fetter management's discretion by substituting their own judgment as to proper hiring practices. *Furnco Constr. Corp. v. Waters*, 438 U.S. 573, 578, 98 S. Ct. 2943, 2950 (1978) (court cannot require businesses to adopt what it perceives to be the "best" hiring procedures). The evidence simply does not support the district court's finding that Heerdink was equally or better qualified than those applicants who were offered positions.[6] There is no evidence to support a finding that Amoco's preference for experienced applicants was a pretext for discrimination. Similarly, there is no evidence to support a finding that Amoco wanted to discriminate against Heerdink because of her sex and was thus motivated to offer positions to the other applicants who were better qualified than Heerdink.

The district court stated, "the defendant has further failed to . . . otherwise show . . . that better qualified males were available in September, 1979." The Supreme Court does not require this showing. "The employer has discretion to choose among equally qualified candidates . . . ." *Burdine*, 450 U.S. at 261, 101 S. Ct. at 1097. But the evidence shows that Dike was better qualified than Heerdink and available in September, 1979; however, Amoco did not offer him a position until November or December of 1979. The more reasonable explanation for this delay in hiring (and one rejected without explanation by the magistrate) is that the precarious economic climate affected the timing of Stoltz' hiring decisions. Title VII was not intended to "diminish traditional management preroga-

[6] Clearly Heerdink and those offered positions all met the minimum job requirements designated by Amoco, however, it would be highly misleading to suggest that all applicants who meet the minimum requirements are equally qualified.

tives." *Id.* at 257, 101 S. Ct. at 1096. Here, the district court substituted its judgment for that of Stoltz and determined that Stoltz should have hired another driver immediately after Hall's dismissal. This is an unnecessary intrusion upon management's discretion. The evidence demonstrates that it was not unreasonable, given the instability of the petroleum business, for Stolz to have waited until November or December to hire additional drivers.

We recognize that there exists a potential for abuse when employers are granted broad discretion in determining whom they will hire. However, it would be impractical to require employers to list with particularity each objective and subjective qualification that will be considered and precisely how much weight will be assigned to each in the inevitably subjective relative comparisons of job applicants. By definition, the job applicant hired is the one most preferred by the employer. Here, there is no evidence that Stoltz based his hiring decision on any considerations other than nondiscriminatory, legitimate business reasons.

III.

The trial court's finding regarding discriminatory intent may be overturned only if shown to be clearly erroneous. *Germane v. Heckler*, 804 F.2d 366, 368 (7th Cir. 1986) (citing *Batson v. Kentucky*, 476 U.S. 79, 98 n.21, 106 S. Ct. 1712, 1724 n.21 (1986)); *McCluney v. Jos. Schlitz Brewing Co.*, 728 F.2d 924, 927 (7th Cir. 1984). "[A] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." *McCluney v. Jos. Schlitz Brewing Co.*, 728 F.2d 924, 927 (7th Cir. 1984) (quoting *Lee v. National Can Corp.*, 699 F.2d 932, 936 (7th Cir. 1983), *cert. denied*, 464 U.S. 845, 104 S. Ct. 148 (1983)). The ultimate inquiry in a Title VII disparate treatment claim is whether discriminatory intent was a "but for" cause of the adverse

action. *Germane v. Heckler*, 804 F.2d 366, 368 (7th Cir. 1986). Thus, the evidence must demonstrate that sex was a determining factor in the sense that Heerdink would not have been rejected "but for" Amoco's motive to discriminate against her because of sex. *See Williams v. Williams Electronics, Inc.*, 856 F.2d 920 (7th Cir. 1988). We are convinced that the district court committed clear error by ignoring the obvious reason for not hiring plaintiff; the evidence unequivocally shows that the applicants who were offered positions had more total driving experience and more petroleum transport experience than did Heerdink. Heerdink's sex is not a "but for" reason for her rejection since the evidence supports not it, but another legitimate nondiscriminatory business reason for the rejection: Heerdink had significantly less experience in driving trucks than did the other applicants who were offered positions.

For the forgoing reasons, we REVERSE the district court's entry of judgment for plaintiff and REMAND for entry of judgment in favor of the defendant.

A true Copy:

Teste.

Clerk of the United States Court of Appeals for the Seventh Circuit

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

January 8, 1991

Before

Hon. William J. Bauer, Chief Judge

Hon. Kenneth F. Ripple, Circuit Judge

Hon. Michael S. Kanne, Circuit Judge

BETTYE HEERDINK, Plaintiff-Appellee,	Appeal from the United States District Court for the Southern District of Indiana, Evansville Division.
No. 89-2596 VS.	No. 81 C 144
AMOCO OIL COMPANY, Defendant-Appellant	J. P. Endsley, Magistrate.

O R D E R

On consideration of the petition for rehearing with suggestion for rehearing en banc filed in the above-entitled cause, no judge in active service requested a vote on the suggestion for

rehearing en banc* and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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*Circuit Judge Walter J. Cummings disqualified himself from any participation therein.

Supreme Court, U.S.
FILED
MAY 21 1991
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No. 90-1518

In The

Supreme Court Of The United States

October Term, 1990

BETTYE HEERDINK,
Petitioner,

v.

AMOCO OIL COMPANY
Respondent.

Petition For A Writ Of Certiorari to The United States Court Of Appeals for The Seventh Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals, after reviewing the evidence in the record, correctly held that petitioner failed to prove that respondent Amoco Oil Company declined to hire her because she is a woman.

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No. 90-1518

In The

Supreme Court of the United States

OCTOBER TERM, 1990

BETTYE HEERDINK,
Petitioner,

v.

AMOCO OIL COMPANY,[1]
Respondent.

Petition For A Writ Of Certiorari to The United States Court Of Appeals for The Seventh Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A37-A46) is reported at 919 F.2d 1256. The order of the district court (Pet. App. A5-A36) is not reported.

[1] Amoco Oil Company's parent corporation is Amoco Corporation. Amoco Oil Company has no non-wholly owned subsidiaries.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1990. A petition for rehearing was denied on January 8, 1991. Pet. App. A47. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On July 23, 1979, petitioner applied for a job as a truck driver at respondent's terminal in Evansville, Indiana. Pet. App. A38. The job involved the transportation of gasoline and petroleum distillates to respondent's customers. Respondent's drivers are responsible for the safe loading, transporting, and unloading of such flammable petroleum products. I Tr. 91. Petitioner had driven a truck for three years, but she had no experience hauling petroleum products. Pet. App. A38-A39. In all, ten people applied for the three open truck-driver positions at the Evansville terminal in 1979. *Id.* at A39.

Respondent's terminal manager -- Gene Stoltz -- made the hiring decisions. Stoltz told petitioner that "he would consider someone with experience before he would consider her." Pet. App. A39. On August 27, 1979, respondent hired William Hall as a petroleum truck driver. *Ibid.* Hall had transported petroleum products for seven years, and he was familiar with respondent's terminal and procedures. *Ibid.* He had gained experience with respondent's operations while he worked for Coastal Truck Lines -- a carrier under contract to haul respondent's petroleum products. *Ibid.*, II Tr. 180. [2]

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[2]Respondent dismissed Hall soon after he was hired because he performed poorly. Pet. App. A39.

In late 1979, respondent offered a truck-driver position to Allen Dike. Like Hall, Dike had hauled petroleum products for at least six years and he had worked for Coastal Truck Lines where he had gained experience with respondent's facilities and procedures. Pet. App. A39-A40, III Tr. 38. Dike, however, declined respondent's job offer. Respondent then hired Larry Happe and George Rupp. Happe had driven petroleum products for sixteen years; Rupp had transported petroleum for eight years, and he was familiar with respondent's operations by virtue of his prior employment with Coastal Truck Lines. Pet. App. A39-A40, III Tr. 53-56.

2. Petitioner filed this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, in the United States District Court for the Southern District of Indiana. Petitioner contended that respondent failed to hire her as a truck driver in 1979 because she is a woman. The case was tried to a magistrate with the consent of the parties. Pet. App. A5.

The magistrate ruled in favor of petitioner. The magistrate found that respondent's explanation for its hiring decisions -- *i.e.*, the greater experience of those hired -- was a pretext for discrimination. Pet. App. A16. The magistrate stated that respondent "failed to meet its burden of . . . proving a legitimate nondiscriminatory business reason for preferring to hire the male applicants instead of" petitioner. *Id.* at A30. Accordingly, the magistrate found that respondent declined to hire petitioner because she is female. *Id.* at A23. The magistrate awarded petitioner back pay and attorney's fees. *Id.* at A24.

3. A unanimous panel of the court of appeals reversed. Pet. App. A37-A46. The court first noted that the magistrate erred in his discussion of respondent's burden to rebut petitioner's prima facie case of discrimination. The court of

appeals stated that the magistrate "incorrectly assumed that [respondent's] burden of rebuttal carried with it a burden of proof; [respondent] only bears a burden of production." *Id.* at A42.

More important, the court of appeals held that the magistrate's ultimate finding regarding discriminatory intent was "clearly erroneous." Pet. App. A45. After reviewing the evidence, the court stated:

> There is no evidence to support a finding that [respondent's] preference for experienced applicants was a pretext for discrimination. Similarly, there is no evidence to support a finding that [respondent] wanted to discriminate against [petitioner] because of her sex.

Id. at A44.

The court of appeals observed that the magistrate "committed clear error by ignoring the obvious reason for not hiring [petitioner]; the evidence unequivocally shows that the applicants who were offered positions had more total driving experience and more petroleum transport experience than did [petitioner]." Pet. App. 46. And the court concluded that "there is no evidence that Stoltz based his hiring decisions on any considerations other than nondiscriminatory, legitimate business reasons." *Id.* at 45.

ARGUMENT

The decision of the court of appeals is correct and it does not conflict with the decision of any other court. Thus, no further review of the fact-specific question presented is warranted.

1. Contrary to petitioner's suggestion (Pet. 7-9, 27), the Seventh Circuit applied the correct standard of appellate review. Following this Court's direction in *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715 (1983), the court of appeals noted that the critical issue for review was the magistrate's ultimate finding of discriminatory intent. Pet. App. A41-A42. The court noted that the magistrate's finding could be "overturned only if shown to be clearly erroneous." *Id.* at A45. And the court adopted this Court's definition of the phrase "clearly erroneous" - *i.e.*, a finding is clearly erroneous if "'the reviewing court is left with a definite and firm conviction that a mistake has been committed.'" Pet. App. A45 (citation omitted). *Compare Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985) (same definition).

The court of appeals rightly performed its duty to review the record even though the magistrate couched some of his subsidiary findings in terms of credibility. As this Court noted in *Anderson v. City Of Bessemer City*, "factors other than demeanor and inflection go into the decision whether or not to believe a witness. . . . Where such factors are present, the court of appeals may well find clear error even in a finding purportedly based on a credibility determination." 470 U.S. at 575.

Petitioner is also mistaken in contending (Pet. 9) that the Seventh Circuit ignored this Court's opinion in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). In *Patterson*, the Court observed that a plaintiff may not be limited in the type of evidence that she submits to prove that the defendant's proffered reason is a pretext. In line with that decision, the court of appeals in this case did not adopt any artificial or limiting rules of relevancy. On the contrary, the court simply ruled that

"[t]here is no evidence to support a finding that [respondent's] preference for experienced applicants was a pretext for discrimination." Pet. App. A44. [3]

In short, the court of appeals applied the correct legal standards for appellate review. It reviewed the record evidence and was "left with a definite and firm conviction that a mistake ha[d] been committed." Pet. App. A45. The Seventh Circuit, of course, frequently affirms findings of trial courts in Title VII cases. *See, e.g., Swanson v. Elmhurst Chrysler-Plymouth, Inc.*, 882 F.2d 1235, 1238 (7th Cir.) (finding of Title VII violation not clearly erroneous), *cert. denied*, 110 S. Ct. 758 (1989); *Yowell v. United States Postal Service*, 810 F.2d 644 (7th Cir. 1987) (finding of no discriminatory intent not clearly erroneous). In this case, however, the court of appeals reviewed the evidence and concluded that the magistrate had committed a clear error. That fact-specific determination does not merit this Court's review.

2. The court of appeals correctly held that the magistrate clearly erred in finding that respondent did not hire petitioner because of her sex. It is evident that, because the transportation of petroleum products is a hazardous occupation (I Tr. 91), it made sense for respondent's terminal manager to prefer applicants with experience in hauling petroleum. Accordingly, he offered jobs to four applicants who had between six and sixteen

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[3]Petitioner makes the same error as the magistrate in asserting (Pet. 58) that respondent had the burden "to prove that [petitioner] was not a victim of discrimination." Petitioner, of course, had the burden of proving that she was the victim of illegal discrimination. *See Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981).

years' experience in driving petroleum products. Pet. App. A39-A40. And three of those applicants were familiar with respondent's terminal and procedures. *Ibid.*

By contrast, petitioner had no experience in hauling petroleum products. Pet. App. A39. Thus, the powerful objective evidence shows the sincerity of the terminal manager's non-discriminatory statement to petitioner that "he would consider someone with experience before he would consider her." *Ibid.* To be sure, petitioner presented bits of evidence to counter that clear conclusion -- *e.g.*, the terminal manager did not list all of his hiring criteria with the Indiana Employment Security Division (Pet. 13). As the court of appeals observed, however, plaintiff's evidence was: (1) consistent with respondent's non-discriminatory explanation, and (2) wholly insufficient to overcome the plain inference that petitioner was not hired because she was far less experienced than those hired.

3. Petitioner's other fact-specific contentions also lack merit. For example, petitioner contends (Pet. 11-12) that respondent did not perform studies to validate the terminal manager's preference for applicants with experience in transporting petroleum. But this is not a case where respondent was required to prove, by objective data, the reasonableness of its hiring criteria. Rather, petitioner had the burden of proving that respondent used an illegal hiring criterion -- *i.e.*, sex. *See Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981). And the court of appeals correctly ruled that petitioner did not carry that burden.

Likewise, petitioner misses the mark when she argues (Pet. 18-19) that she was qualified for the truck-driver position. Respondent does not dispute that petitioner met the minimum qualifications for the job, and that she could have been trained to perform the job's tasks. *See* Pet. App. A44 & n.6. The point,

however, is that the undisputed and powerful evidence showed that Stoltz made offers to four other applicants because they were more qualified than petitioner.

Petitioner also suggests (Pet. 23, 54) that statistics show that respondent had a company-wide policy of discrimination. But the magistrate himself found that petitioner's "statistical analysis [was] not persuasive of a company-wide policy of discrimination." Pet. App. A33. In fact, the evidence showed that respondent's Indianapolis terminal hired a greater percentage of female applicants than male applicants when it hired 31 new drivers in 1979. Resp. C.A. Reply Br. 18. And since 1978, respondent has far exceeded the industry average in its hiring of female drivers in Indiana. *Id.* at 19-20. Accordingly, petitioner's reference to statistics does not undermine the court of appeals' decision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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